No. 5906

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIDELITY AND DEPOSIT COMPANY OF MARYLAND (a corporation),
Appellant,

vs.

A. G. COL COMPANY, INC. (a corporation),
Appellee.

BRIEF FOR APPELLEE.

SIMEON E. SHEFFEY,
Hunter-Dulin Building, San Francisco,
ALDEN AMES,
Hearst Building, San Francisco,
Attorneys for Appellee.

FILED
DEC 3 - 1929
P. O'BRIEN,
CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Page

Statement of facts.................................... 1

Argument 2

I.

Appellant's liability arises not from a breach of the condition in the bond to the effect that A. G. Col will perform his duties faithfully as receiver, but from a breach of the condition that A. G. Col was rightfully appointed as such receiver; or in other words, appellant's agreement to pay appellee all the damage it would suffer in case the arrangement of A. G. Col was wrongfully or without just cause obtained.......................... 2

II.

The Superior Court making the ex parte order appointing the receiver had jurisdiction of the subject matter of the action and the parties thereto........................ 3

III.

The bond in suit was given by the parties executing the same—of whom appellant was one—for the purpose contemplated by Section 566 of the Code of Civil Procedure of the State of California and with the intention that it should be the applicant's bond referred to in said section and as such was accepted by the court................ 9

IV.

An instruction correct in law but upon a subject that is outside the issues is not cause for reversal unless it tends to mislead the jury as to the question for decision...... 21

V.

Rule of damages—generally............................ 24

A. Attorneys' fees as an item of damage............. 29

B. Interest as an element of damages................ 31

VI.

No default by receiver. Appellant's points IV, VI and VII. 37

Table of Authorities Cited

Pages

Brainard v. Jones, 18 N. Y. 35 32

City and County of San Francisco v. Hartnett, 1 Cal. App. 652 8

Civil Code of California, Section 3333 24

Clark, Estate of, 180 Cal. 395 23

Coburn v. Townsend, 103 Cal. 233 7

A. G. Col Company, Inc. v. Superior Court, 196 Cal. 604 .. 6, 9

Conant v. Newton, 126 Mass. 105 7

Cook v. Terry, 19 Cal. App. 765 29

9 Corpus Juris, pp. 31, 32 .... 3, 16

17 Corpus Juris, p. 712 24

Furber v. McCarthy, 12 N. Y. Supp. 794 34

Gurenini Stone Co. v. Carlin, 240 U. S. 264 29

Heim v. Mooney, 23 Cal. App. 233 25

Holden v. Trust Co., 100 U. S. 72 35

Illinois Surety Co. v. U. S. 251 Fed. 823 16

Java Cocoanut Oil Co. v. Fidelity and Deposit, 300 Fed. 302 31

Joslin v. Williams, 76 Neb. 597 (107 N. W. 837) 30, 37

Kiessig v. Allspaugh, 91 Cal. 234 10

Kurtz v. Forquer, 94 Cal. 91 14

Lambert v. Haskell, 80 Cal. 611 26

Marston v. Pickwick Stages, Inc., 78 Cal. App. 526 24

Mazuran v. Finn, 53 Cal. App. 656 12

Panter v. National Surety Co., 36 Cal. App. 44 36

2 Parson's Contracts 515 3

People v. Cabannes, 20 Cal. 525 8

Schuman v. Karrer, 184 Cal. 50 27

Stephenson v. Monmouth Min. & Mfg. Co., 84 Fed. 114 .. 17

Tacoma v. Sperry, etc. Co., 144 Pac. 544 34

Taylor v. Exnicious, 197 Cal. 443 6

Trimble v. Trueman, 175 Cal. 696 5

U. S. v. Diekerhoff, 202 U. S. 302 19

U. S. v. North Carolina, 136 U. S. 211 35

Westervelt v. Mohrenstecher, 76 Fed. 118, 121 3

Young v. Godbe, 15 Wall. 562 36

No. 5906

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIDELITY AND DEPOSIT COMPANY OF MARYLAND (a corporation), *Appellant,*	
vs.	
A. G. COL COMPANY, INC. (a corporation), *Appellee.*	

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

On or about the 30th day of June, 1925, in an action pending in the Superior Court of the State of California, in and for the County of Santa Clara, the bond which is the basis of this suit was given pursuant to the provisions of Section 566 of the Code of Civil Procedure of the State of California to procure the issuance of an *ex parte* order by said Superior Court appointing one A. G. Col as receiver for appellee's business. The bond in question was not given pursuant to said order but antecedent thereto and by said Superior Court was required as a condition precedent to the issuance of said *ex parte* order.

These facts appellee will develop more specifically in connection with its argument presented herewith.

ARGUMENT.

I.

APPELLANT'S LIABILITY ARISES NOT FROM A BREACH OF THE CONDITION IN THE BOND TO THE EFFECT THAT A. G. COL WILL PERFORM HIS DUTIES FAITHFULLY AS RECEIVER, BUT FROM A BREACH OF THE CONDITION THAT A. G. COL WAS RIGHTFULLY APPOINTED AS SUCH RECEIVER; OR IN OTHER WORDS, APPELLANT'S AGREEMENT TO PAY APPELLEE ALL THE DAMAGE IT WOULD SUFFER IN CASE THE APPOINTMENT OF A. G. COL WAS WRONGFULLY OR WITHOUT JUST CAUSE OBTAINED.

The condition of the bond provides as follows:

> "Now, therefore, the condition of this application is such that if the said A. G. Col and said surety, their heirs, executors or administrators, or any of them, shall well and truly pay to the defendants, or either of them, all damages that all or either of them may sustain by reason of the appointment of said receiver and entry by him upon his duties in case the applicant shall have procured said appointment wrongfully, maliciously or without just cause."

The effect of the further condition in the bond to the effect that

> "The receiver shall faithfully perform all of his duties as such receiver,"

does not detract from or nullify the undertaking of appellant to pay damages according to the provision of the said bond first hereinabove quoted.

> "A bond or obligation is a deed at common law and is also regarded as a contract and is to be

construed, like other contracts, according to the fair import of the language used."

9 *C. J.* 31.

"A bond is nothing but a contract. It is the written evidence of the meeting of the minds of the parties to it and subject to the rules favoring sureties * * * it must be construed by the established canons for the interpretation of contracts. The rule for the construction of contracts which prevails over all others is that the court may put itself in the place of the contracting parties; may consider in view of all the facts and circumstances surrounding them at the time of the execution of the instrument, what they intended by the terms of their contract and when their intention is manifest it must control in the interpretation of the instrument regardless of inapt expressions or more technical rules of construction."

Westervelt v. Mohrenstecher, 76 Fed. 118, 121.

"A bond for money with a penalty for not doing a certain thing will be held to be a contract to do that thing."

2 *Parsons, Contract* 515.

II.

THE SUPERIOR COURT MAKING THE EX PARTE ORDER APPOINTING THE RECEIVER HAD JURISDICTION OF THE SUBJECT MATTER OF THE ACTION AND THE PARTIES THERETO.

Appellant makes much argument over the fact that the *ex parte* order of the court appointing the receiver was void for lack of jurisdiction of the court to make such order. Appellant loses sight of the fact that the bond was given not pursuant to the void *ex parte* order, but prior thereto and pursuant to the

requirement of the court enjoined upon the court by Section 566 of the Code of Civil Procedure of the State of California, that the bond in question was given antecedent to and as a condition precedent to the making of the *ex parte* order.

Appellee alleged in its complaint in the above entitled matter as follows:

> "X. That on or about the 30th day of June, 1925, the said California Sweet Potato Corporation applied to the said Superior Court of the State of California in and for the County of Santa Clara, for an order to be made ex parte appointing a receiver for the said business and real estate of plaintiff hereinabove described. That in order to secure the making of an order for the appointing of a receiver in said action and thereby securing the appointment of a receiver therein, defendant above named executed its certain bond or undertaking, a copy of which bond or undertaking is hereto annexed, marked Exhibit 'B' and made a part hereof.
>
> XI. That prior to the making and giving of an order appointing a receiver in said action, and in order to secure the making and giving of such an order, the defendant herein, in consideration of the giving and making of such an order and in order to enable the said plaintiff in said action to secure the same did execute the foregoing bond or undertaking and the said California Sweet Potato Corporation did on or about the 30th day of June, 1925, present the said bond or undertaking to the said Superior Court, and said bond or undertaking was on or about the 30th day of June, 1925, approved by the said Superior Court, and on said date and prior to the making of said order (5) of said Superior Court hereinafter mentioned, duly filed in the office of the Clerk of the said action then pending.

XII. That upon the filing of said bond or undertaking aforesaid, the said California Sweet Potato Corporation, plaintiff in said action, did procure in said action, and the said Superior Court in said action did give and make, its certain order appointing one A. G. Col receiver therein, and did direct said receiver to take possession of said business hereinabove described and directed the said receiver to collect the rents, issues and profits of the said business and retain possession thereof until further order of the said Superior Court, and further to carry on the said business then and theretofore carried on on said premises above described by this plaintiff, and did require and direct the plaintiff in this action and all persons holding any of their property for them or either of them, and their agents, attorneys, servants and employees to surrender, turn over and deliver unto said receiver and into his possession all the property of said business, including the books, papers, and accounts of said business immediately upon the service of a copy of said order."

(Transcript pp. 6-7.)

The jury in this matter returned a verdict favorable to appellee. Such verdict is a finding of the truth of all the material allegations contained in plaintiff's complaint.

Trimble v. Trueman, 175 Cal. 696.

The court making the *ex parte* order had jurisdiction of the subject matter of the action in which the order was made and the parties thereto. It had jurisdiction to require an undertaking to be made to compensate appellee in damages in the event the *ex parte* order was obtained wrongfully or without just cause. It was not acting without jurisdiction in making such

requirement. It was pursuant to this requirement that the bond in question was given. Whether or not the *ex parte* appointment was void or not is material only on the question of whether or not the *ex parte* order was obtained wrongfully or without just cause. That such was the case has been determined by the Supreme Court of the State of California in the case of

A. G. Col Company, Inc. v. Superior Court, 196 Cal. 604.

Appellee readily admits that the *ex parte* order was void but does not admit that the bond in question was given pursuant to said order.

In view of the allegations in plaintiff's complaint, above set forth, and the verdict of the jury in this matter, it would seem that most of appellant's contentions are swept away and most certainly its contention that appellant has no liability on the bond because the *ex parte* order was void. All of the authorities cited by appellant in its brief in support of this latter point are not germane to the discussion of its liability on the bond in suit.

Appellant cites and leans heavily on the case of

Taylor v. Exnicious, 197 Cal. 443.

In this latter case, the action was brought for breach of condition of a bond given for the faithful performance of his duties as such by a person appointed receiver. The receiver appointed defaulted in the moneys and property that came into his possession as such receiver. It was held that the court making the order appointing the receiver acted with-

out jurisdiction and that the bond given pursuant to the order appointing the receiver was without consideration and void.

This is not the case at bar. The bond in suit was given antecedent to and not pursuant to the *ex parte* order appointing the receiver.

The same observations apply to the other authorities cited by appellant in support of his contention.

Appellant cites the case of

Conant v. Newton, 126 Mass. 105

and states that it is a case, "on principle exactly parallel." Appellee desires to call this court's attention to the fact that the court in this "exactly parallel" case stated, "the probate court had no jurisdiction over the parties or the subject matter." This statement indicates how nearly parallel this authority is to the case at bar where the court making the *ex parte* order had jurisdiction over the subject matter of the action and the parties thereto.

A review of the other cases cited by appellant on this point indicates that they are just as nearly parallel to the case at bar as the Massachusetts case is.

Coburn v. Townsend, 103 Cal. 233

cited by appellant as a case "squarely in point" was a case involving a bond which was given pursuant to an unconstitutional statute and a case where all the damages had been paid by the principal. Appellee does not believe that appellant is presumptuous enough to urge upon this court that Section 566 of the Code of Civil Procedure of the State of California is unconstitutional. If said section were unconstitu-

tional, then appellant's case might be "squarely in point."

Appellant cites

City and County of San Francisco v. Hartnett, 1 Cal. App. 652,

which involved a bail bond the amount of which was fixed by the bond and warrant clerk, who had no authority, jurisdictional or otherwise, to fix the amount of the bond.

In the bond in the case at bar, not only did the court have jurisdiction to require the bond, but also to fix the amount.

People v. Cabannes, 20 Cal. 525,

cited by appellant, involved a bond required by a Justice of the Peace to be given upon a criminal appeal. The quotation from this case, given by appellant, shows that the Justice had no jurisdiction to require the bond, which is enough to distinguish this case from the case at bar.

A further review of appellant's authorities will show that they all fall within the same category, i. e., bonds that were required by courts or officials having no jurisdiction over the subject matter of the action or without statutory authority to make the requirement.

III.

THE BOND IN SUIT WAS GIVEN BY THE PARTIES EXECUTING THE SAME—OF WHOM APPELLANT WAS ONE—FOR THE PURPOSE CONTEMPLATED BY SECTION 566 OF THE CODE OF CIVIL PROCEDURE OF THE STATE OF CALIFORNIA AND WITH THE INTENTION THAT IT SHOULD BE THE APPLICANT'S BOND REFERRED TO IN SAID SECTION AND AS SUCH WAS ACCEPTED BY THE COURT.

Appellant contends that the bond in suit does not comply with the provisions of Section 566 of the Code of Civil Procedure of the State of California because it is not signed by the California Sweet Potato Corporation.

As above set forth, this bond was given by appellant voluntarily for the purpose of obtaining the *ex parte* order referred to; was approved as such by the court making the order and thereafter and in consideration therefor the said *ex parte* order was made. Should this irregularity be allowed to defeat the purpose for which the bond was made, the intention of the parties or the intendment of the statutory section?

The appointment of a receiver for a going business is a very drastic action under any circumstances and should not be indulged in when a less drastic action will suffice.

A. G. Col Company v. Superior Court supra.

This statement of law is applicable with greater force where a receiver is to be appointed *ex parte* where the person for whose business the receiver is appointed has no opportunity to be heard. The requirement of Section 566 of the Code of Civil Procedure is for the benefit and protection of the person

for whose business a receiver is appointed *ex parte*. If such were, in the nature of events possible, such person might waive the benefit which he is entitled to receive under this section in whole or in part. If a party may waive all of his right, he may waive a part of it.

Appellee's situation here is not unanalogous to a situation where he could, in the nature of events, waive the benefit he would be entitled to receive under the statute. Appellee here had no opportunity to examine, question or approve the bond or its form. Appellee's first knowledge of its existence came as a consequence of the service upon it of the *ex parte* order that was made in consideration thereof. Appellant presented the bond in suit to the court for the purpose of procuring an *ex parte* order that resulted in appellee's damage. Responsibility for the form of the bond is upon appellant's shoulders. If the bond is wrong in form, it is the wrong of the appellant. A party cannot avail himself of his own wrong. If the right exists in anyone to question the form of the bond, it should exist in appellee alone.

In the case of

Kiessig v. Allspaugh, 91 Cal. 234,

the action was against sureties upon a contractor's bond given for the faithful performance of a contract which the law required to be recorded in order to be valid. The contract for the performance of which the bond was given was not recorded and, as a consequence, void. The contractor performed the contract, however, and upon suit upon the bond, the court held the sureties were even so liable.

At page 236 the court says:

> "Appellant contends that there can be no recovery on the bond because of the failure to record the building contract to which it refers; that the original contract being void under the statute, that this bond which was given to secure in part the performance of such contract is equally void and incapable of enforcement. This contention is based upon Section 1183 of the Code of Civil Procedure which provides that
>
> 'A building contract which is not recorded before the work is commenced, when the contract price exceeds $1000, shall be wholly void and no recovery shall be had thereon by either party thereto.' "

At page 238 the court says further

> "We do not think that the appellant, after delivering this bond as an independent surety and thereby inducing the plaintiff to make full payment of the contract price for the construction of the building, is in a position to deny his liability upon it, and if in order to support this action it is necessary that the bond should be based upon a valid building contract, we should hold that the appellant is estopped to dispute the truth of the particular recital contained in the bond as to such fact."

In the case at bar, the *ex parte* order was obtained upon the strength of the bond in suit. Appellant received the consideration for which the bond was given and, in line with the above cited case, should it not now be estopped to dispute its liability upon any irregularity in the form of the bond?

Section 566 of the Code of Civil Procedure of the State of California is remedial in its nature and should be liberally construed.

Mazuran v. Finn, 53 Cal. App. 656,

in which case the bond was irregular in the naming of the obligee. At page 659 the court says:

> "This brings us to a consideration of the specific objection urged by the petitioner to the procedure followed in this case. The code does not specifically designate the person to whom the bond, given under section 710, shall be executed. The third party claimants below first filed an undertaking in which the respondent here, as sheriff of the City and County of San Francisco, was named the obligee, although the condition of the obligation was to pay to the petitioner, the judgment creditor, as required by the statute. On objection of the petitioner the claimant filed a new undertaking which recites that the surety company executing the bond is bound either to Thomas F. Finn, sheriff of the City and County of San Francisco, State of California, or M. J. Mazuran, plaintiff in the action and judgment creditor of the judgment in the undertaking theretofore referred to, 'whichever of them is, or may be finally adjudged to be the proper obligee of the undertaking, (but not to both of them jointly), and if neither be so adjudged, then unto the State of California,' in the sum of $4700, or twice the value of the property levied upon which is stated to be $2350. It has been held that a bond may be valid, though the obligee named be not the one designated by statute. In such a case one may show by the record of the suit in which the bond was given, and by extraneous facts, that he was the person intended as the obligee. Morgan v. Thrift, 2 Cal. 562, Board, etc. v. Grant, 107 Mich. 151, 64 N. W. 1050. But even if under such liberal rule the first undertaking should be held insufficient, the second was a substantial compliance with the code sections, which are remedial in their nature and should be construed liberally, and so as to extend the remedy. Cullerton v. Mead, 22 Cal. 96, 98.

> The naming of others in the alternative with the judgment creditor as obligee, when read in connection with the recital of the obligation of the bond, which literally follows the code, may be designated as surplusage."

The bond in question is not an informal bond but by its terms and recitals is very specific as to the purpose for which it was given and the things which appellant "jointly and severally" undertakes to do, to-wit:

> "To pay to defendants, or either of them, all damages that all or either of them may sustain by reason of the appointment of said receiver and the entry by him upon his duties in case the applicant shall have procured said appointment wrongfully, maliciously or without just cause."

The further recitals or undertakings cannot take away from it the effect of the provisions quoted. If the bond in suit answers the purpose of the statute, the only material questions involved as to appellant's liability are:

1. Was the bond in suit voluntarily given?

2. Was it intended by the parties executing it to answer the purpose of the statute?

3. Was there any consideration for the bond?

4. Did appellant intend that its liability under the bond should be conditioned upon the California Sweet Potato Corporation signing the same?

5. If the fourth question be answered in the affirmative, is the liability of appellant under the bond given any more onerous than it would be if the Cali-

fornia Sweet Potato Corporation had signed the bond?

The first and second questions are answered by the recitals in the bond. It follows the language of Section 566 of the Code of Civil Procedure of the State of California showing that it was intended to answer the purpose of the statute.

With reference to the third question, plaintiff alleged in its complaint herein that the bond was given in consideration of procuring said *ex parte* order. The verdict of the jury in this case is conclusive that this allegation was correct.

With reference to the fourth question, nothing appears in the bond to the effect that appellant's liability thereon was conditioned upon the signing of the California Sweet Potato Corporation. Furthermore, it is a joint and several bond and consequently since appellant is severally liable under the bond, its liability under the bond as given is no more onerous than if the same had been signed by the California Sweet Potato Corporation.

It is not necessary that the principal sign a bond in order to make the surety liable.

Kurtz v. Forquer, 94 Cal. 91.

In this case the sureties on a bond sought to deny liability thereon because of the fact that the principal had not signed the bond. The undertaking was joint and several and the court held that the failure of the principal to sign the bond did not affect the liability of the sureties.

At page 93 the court says:

> "Where several persons are named in the body of an instrument as parties thereto, it is not necessarily invalid as against those who signed it because others named have not signed. Such a result would follow where it appeared on the face of the instrument, or by proof, that the persons sought to be charged signed upon the consideration that other persons named would also sign. (Cavenaugh v. Casselman, 88 Cal. 549.) Nothing of the kind, however, appears in the case at bar. The three sureties who stood on the same footing did sign the instrument and it is evident that the signatures of the principals who were already bound by the contract referred to in the bond, were not necessary as a consideration. *Moreover, appellants delivered the bond without the signatures of the principals to the plaintiff.* We think, therefore, that the sureties are liable so far as this point is concerned."

The language of the court in the foregoing quotation is very apropos to the case at bar. The appellant in this case delivered the bond without the signature of the California Sweet Potato Corporation thereon. The signature of the California Sweet Potato Corporation was not a consideration for the bond. Therefore, appellant should not now be heard to object that the California Sweet Potato Corporation did not sign the bond.

This case seems to be more in the nature of an "exactly parallel" case than any case that has been cited by either appellant or appellee in this matter.

In the case at bar, if the California Sweet Potato Corporation was the principal and did not sign the

bond in suit, it cannot affect appellant's liability because the form of the bond is joint and several.

Furthermore, even though the bond does not conform in all particulars to the statutory requirement, it may nevertheless be good as a common-law bond:

> "As 'common-law bonds' and 'statutory bonds' are to be distinguished, in that the latter conform to a statute while the former do not, although so intended, and as the rights and liabilities arising under the different forms of bonds may likewise be different, it becomes important to ascertain from the language used, together with the facts surrounding its execution, whether a given instrument takes effect as a statutory bond or as a common-law bond. However, it may be stated generally that a statutory bond is one required by some statute, and that, where a statute requires a public officer to execute an official bond, a bond so given is a statutory bond, except that where a bond voluntarily given does not comply with the statute it may take effect as a common-law bond. Where nothing appears in the proceedings to show the character of a bond which is the foundation of an action, it may be regarded as a common-law bond."
>
> 9 *C. J.* 32.

A bond which purports to be a statutory bond but is void as such because it does not contain the condition required by law, may nevertheless be good as a common-law bond.

> *Illinois Surety Co. v. United States,* 251 Fed. 823.

In this case a party brought into the United States through the port of San Francisco certain theatrical equipment. Plaintiff in error in the case gave bond to the effect that the importer would within six months

return the goods to the collector in port. The statute required a bond to the effect that if the goods were not delivered to the collector of exportation within six months, the import duties would be paid.

At page 825 the court says:

> "But it is said that the bond is void because it is not conditioned as required by law; that it is conditioned for redelivery of the goods, and not for the payment of the duties. The statute, it is true, requires that the bond shall be given for the payment of such duties as may be imposed by law in case the goods are not deported within six months, and that in the bond under consideration there is no such provision, but the condition is for redelivery to the collector for exportation within six months. It is clear, however, that, if the bond had been drawn strictly under the terms of the statute, the condition thereof would, in effect, have been complied with by redelivery to the collector, and it is also clear that liability under the bond which was given would have been avoided, if the duties had been paid. The bond is therefore not substantially different from the bond required by the statute. It is a bond to hold the United States harmless against the loss of duties on goods imported into the United States, and its obligation is complied with either by redelivery or by payment of the duties. Statutes requiring the execution of such bonds are remedial in their character and should be construed liberally, to carry out the purpose of their enactment."

A bond containing unauthorized conditions and containing the wrong obligee may be good as a common-law bond.

> *Stephenson v. Monmouth Min. & Mfg. Co.*, 84 Fed. 114.

At page 116 the court says:

"The condition for the protection of the city, though not expressly authorized by any statute or provision of the charter, is not ultra vires, and constitutes a valid common-law obligation, though voluntary."

And further, at page 117:

"There was authority of law for requiring a bond from any contractor for a public work conditioned for the payment by the contractor of all his labor and material debts incurred in the work. Neither was the city of Menominee disqualified or incompetent to be a party to such a contract, as a municipality of the state of Michigan. Knapp v. Swaney, 56 Mich. 345, 23 N. W. 162. A bond taken under this statute, and running to the board of education of Detroit, was held to be a good common-law bond, upon which an action would lie in the name of the board for the use of individuals furnishing materials to a contractor with the board. Board v. Grant (Mich.), 64 N. W. 1050. The powers of a municipal corporation under the laws of Michigan are much wider than those of a board of education. The city had the power to contract for the public work undertaken by Larson, and the power to take from him a bond conditioned for the payment of labor and material claims. The duties of a mere promisee in such a bond are purely nominal, and only for the purpose of furnishing some one who might be a plaintiff. The bond taken is in furtherance of the statutory purpose, and a legislative policy; and we see no reason why the substitution of the city as obligee should vitiate the bond as a common-law obligation. This was the view entertained by the trial judge, who instructed the jury that this was 'a good bond, upon which the city could maintain an action against the sureties,—for the non-payment of this very debt which Larson incurred.' The obligors have chosen to make

the bond payable to the city as trustee for those entitled to its benefit, and we think it is not vitiated as a common-law obligation because it runs to the city of Menominee."

See also the case of

United States v. Dieckerhoff, 202 U. S. 302,

in which case a bond was executed for the redelivery of merchandise imported into the United States. The bond purported to be executed in accordance with the terms of a certain statute but did not follow the strict terms thereof.

At page 309 the court says:

"It may be admitted that the bond does not follow in strict terms the provisions of section 3899, which seems to require, or at least to authorize, a bond in double the estimated value of the merchandise imported, with a condition that it shall be delivered to the order of the collector at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. The statute further provides that if in the meantime any package should be opened, without the consent of the collector or surveyor given in writing, and then in the presence of one of the inspectors of the customs, or if the package is not delivered to the order of the collector, according to the condition of the bond; in either case it shall be forfeited. * * * This bond contains the condition that if the obligors, in lieu of the return of the package pay to the proper collecting officer double the value of the package or packages not so returned then the obligation is to be void.

While the statute does not provide in express terms for a bond thus conditioned, it seems to be well settled that, although not strictly in conformity with the statute, if it does not run counter to the statute and is neither malum pro-

hibitum nor malum in se, it is a valid bond, although not in terms directly required by the statute. Moses v. United States, 166 U. S. 571, 586. Indeed, the learned counsel for respondents concedes that such a bond can be taken, and in his brief says: 'Respondents make no point as to the conformity of the bond to the statute, or the right of the United States or the collector to enforce it in its form as made. For the purposes of this argument we concede that it was a voluntary bond, enforceable according to its terms, and that there has been a breach.'

But we think this something more than a mere voluntary bond. The statute authorizes, it is true, a more stringent undertaking, for literally it authorizes a bond in double the value of the merchandise, conditioned that it shall be delivered to the order of the collector at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. And further provides that if, in the meantime, any package shall be opened, except in the presence of the collector in the manner provided, or if the package is not delivered to the order of the collector, according to the condition of the bond, it shall in either case be forfeited. With this ample authority to take a more enlarged undertaking we think it was within the power of the collector to take the bond in suit, which, taken together, provides for the return of any required package in an unopened condition or the payment of double its value as a condition of being discharged from the full penalty of the bond. There is nothing in this bond which runs counter to the statute, and it is within the authority conferred to take a bond which should be forfeited if the package was not returned in the manner required. Certainly the makers of the bond cannot complain that they have been permitted, by its terms, to discharge the obligation to return a package by paying double its value, when a bond in double the value of the mer-

chandise to be forfeited for the non-return of a package unopened might have been required."

Under the foregoing authorities, it is submitted that the bond in this action sufficiently complies with the provisions of Section 566 of the Code of Civil Procedure of the State of California to be classed as a statutory bond under said section, but if the court should be inclined to feel that it does not qualify as a statutory bond, then, under the same authorities, the bond is good as a common-law bond.

The court should choose an interpretation to give force and effect to the bond rather than one that would nullify the contract made by the parties.

IV.

AN INSTRUCTION CORRECT IN LAW BUT UPON A SUBJECT THAT IS OUTSIDE THE ISSUES IS NOT CAUSE FOR REVERSAL UNLESS IT TENDS TO MISLEAD THE JURY AS TO THE QUESTION FOR DECISION.

Appellant complains of instruction No. 5 given by the court to the jury at the trial of this matter and seems to object to that part of the instruction italicized by appellant in its brief on page 19 thereof.

> "Any other items of loss proven to have been suffered by the plaintiff by reason of the appointment of A. G. Col as Receiver."

In the first place, the court limits the items which the jury may consider in fixing damage in the case to those items of loss proven to have been suffered by the plaintiff. In other words, the court instructed the

jury that plaintiff must prove its items of loss. That plaintiff did this is evident from the verdict of the jury, which verdict is amply supported by the evidence in the case.

Plaintiff showed that the first act of the receiver was to stop payment on checks which had been issued by the officers of appellee. (Transcript pp. 55, 56, 57 and 58.) Such an act is sufficient to affect the credit of a business, and whatever affects the credit of a business affects its goodwill.

Appellant's statement in its brief on page 18 thereof is as follows:

> "On the other hand, testimony introduced on behalf of the defendant below was to the effect that the corporation had never made any profits, and that it was virtually insolvent at the time of the receivership (Transcript pp. 89-95); that payment was stopped upon the checks because there was not enough money in the bank to meet them, and criminal proceedings might have resulted had not the receiver taken that precaution,"

evidently was not believed by the jury otherwise the verdict might have been different. On the other hand, plaintiff introduced testimony to show that at the end of May, 1925, appellee, in its business, had a net profit of $15,594.00 (Transcript p. 65); that at the end of September, 1925, this profit had dwindled to $991.08. (Transcript p. 66.)

The presumption of counsel for appellant that appellee was virtually insolvent at the time of the receivership and that appellee had never made any profits, is hardly borne out by the record of testimony. To say the least of it, there was a conflict of testi-

mony. The jury evidently believed the testimony of appellee as to the condition of the credit of appellee and the alleged overdraft of appellee at its bank. (Testimony of J. C. Jewett, Transcript p. 75.) Appellant's witness, E. M. Rosenthal, gave certain testimony which tended to substantiate appellant's contention in this regard. (Transcript pp. 93-95.) However, the jury could hardly have believed the testimony of Mr. Rosenthal in view of the affidavit which had been made by the witness some three years prior to the time of trial. (Transcript p. 97.)

The court instructed the jury that they were to determine the issues of the case from the evidence. The jurors were sworn to decide the issues of the case according to the facts. This Court cannot, on appeal, indulge in the surmise that the jury disregarded these express instructions and their oaths to decide the case from the evidence introduced and the law given them by the court.

See

Estate of Clark, 180 Cal. 395.

At page 397 the court says:

> "We cannot, on appeal, indulge in the surmise that the jury may have disobeyed these elaborate and express instructions of the Court, disregarded their oaths to decide the case from the evidence introduced and in accordance with the law as given them by the Court, and may have gone afield upon an inquiry as to the extent of the estate and the amounts which the interested parties would ultimately receive * * *. The instruction was correct in point of law and though it may have been irrelevant to the issue, there was nothing in it which could tend to mislead or to

> confuse the jury with regard to a question so clearly and precisely submitted for its decision. An instruction, correct in point of law, but upon a subject that is outside the issues, is not cause for reversal unless it tends to mislead the jury as to the question for decision."

Where a court gives an instruction on an abstract principle of law from which no injury could have resulted, the appellate court will not disturb a verdict where there is substantial evidence to support it.

Marston v. Pickwick Stages, Inc., 78 Cal. App. 526.

The foregoing authorities have been given upon the theory that the part of the instruction complained of by appellant is upon a point not within the issues of the case. However, it is submitted that this is not the case; that the instruction is correct in every particular even to the point objected to by appellant. The instrument is well within the general rule of damages.

V.

RULE OF DAMAGES—GENERALLY.

Civil Code, Sec. 3333.

> "Breach of obligation other than contract. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided for by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

17 *C. J.* 712.

> "General Damages. General damages are such as the law implies and presumes to have occurred

> from the wrong complained of. They are such as naturally and necessarily result from the wrong, although this does not mean that they must inevitably and always result from a given wrong. General damages in the case of a breach of contract are such damages as the law implies or presumes from the breach complained of. Similarly, in an action of tort general damages are such as are not caused by any incidental fact or by the peculiar situation and circumstances of the party but are the natural and uniform effects of the injury itself. The subject of general and special damages as contradistinguished is principally a question of pleading, the general rule being that, where special damages are not claimed, a party can recover only such damages as are not only the natural and proximate result, but also the necessary result of the act complained of."

The same rule of damages applies for the wrongful appointment of a receiver as applies for the wrongful issuance of an injunction. See

Heim v. Mooney, 23 Cal. App. 233.

On page 239, the court says:

> "The pleadings in the original action show that it was brought to enjoin the defendants (plaintiffs here) from interfering with real and personal property involved. The appointment of a receiver was ancillary to that action, and not its main object. It would seem to us that this furnishes some reason for applying the rule governing the liability of sureties on the injunction bond. There is no reason why the rule in actions on injunction bonds should prevail to allow the recovery of damages upon the dismissal of the action and deny it on the receiver's bond, given in the same action, unless the terms of the latter bond compel it, and we do not think they do. Besides, as intimated above, the appointment of the receiver necessarily depends upon the right to the injunction and when that right is swept

away it carries with it all justification for appointing the receiver. If the injunction was improperly issued it must follow that the appointment of the receiver was without sufficient cause."

The rule of damages for the wrongful issuance of an injunction is stated in

Lambert v. Haskell, 80 Cal. 611.

At page 618, the court says:

"It is objected that the respondent was allowed to recover damages for the profit which he would have made had he not been prevented by the injunction from carrying on his business. We think that this was proper. It must be true that where a party is wrongfully prevented by injunction from carrying on a profitable and established business he can recover damages therefor. And if the profits which he would have made are not to be allowed, what damages is he to recover? Would it be adequate compensation to reimburse him merely for his expenditures, and for the losses which he might sustain from being prevented from fulfilling existing engagements, and the depreciation of his stock in trade? If this were true, there would be a very convenient way of getting rid of a business rival. A business might be destroyed by a preliminary injunction before the truth of the allegations upon which it was obtained would be inquired into. The best considered cases agree that where an established business is wrongfully injured or destroyed, the owner of the business can recover the damages sustained thereby and that upon this question evidence of the profits which he was actually making is admissible. (Citing authorities.) The damages must be proximate, and not too speculative and remote. Thus it has been held that the profits which a party claims that he would have made from a contemplated extension of his business are too remote. (Citing authorities.) But we think that the facts of the present case bring

it within the rule above stated, although the business had only been established a short while."

Schuman v. Karrer, 184 Cal. 50.

"Respondent testified that the amount of loss which he had sustained 'by reason of not being able to purchase and fatten hogs and dispose of them,' because of appellant's interference with said business was 'a little over one thousand five hundred dollars.' The inquiry was objected to on the grounds of incompetency, irrelevancy, and immateriality. It was also objected 'that the profits are speculative, and for further reason that the fattening of hogs for market, or the profit derived from the fattening of hogs, is no part of the conduct of the butcher business.' It was not specified in the trial court, nor is it claimed in the brief on appeal, that the inquiry called for a conclusion or opinion of the witness, but after the respondent had answered, a motion was submitted to strike out the answer 'as not responsive and as stating an opinion and not a fact, and incompetent, irrelevant to any issue in this case.' Elliott on Evidence, Volume 3, Section 1994, states the rule to be that 'where the evidence shows that an established business of a permanent character is broken up, or suspended, by the wrongful act of another, in an action for damages for such wrong, proof may be made of the profits * * * present and past, for the purpose of furnishing the jury a basis for the measure of compensation to which the complainant is justly and properly entitled.' (Citing authorities.) In Shoemaker v. Acker, 116 Cal. 239, 244 (48 Pac. 62, 64), the court said 'Prospective profits as damages present one of the most difficult subjects with which courts have to deal. It is not the law however, that they can never be recovered. Our own code states the rule to be that the measure of damages for the breach of a contract is 'the amount which will compensate the party aggrived for all the detriment proximately caused thereby,

or which, *in the ordinary course of things, would be likely* to result therefrom.' (Civ. Code, sec. 3300.) An examination of the authorities will show that the cases in which future profits were rejected as 'speculative' or 'too remote' were cases where the asserted future profits were entirely collateral to the subject matter of the contract, and not consequences flowing in a direct line from the breach of such contract. Familiar instances of profits which are thus speculative and remote are those which might have been realized on a new contract with a third person which could have been consummated with the proceeds of the contract sued on if the latter had not been broken; for, in such cases, the profits on the new contract are wholly collateral to the one broken, do not directly flow from it, and are not stipulated for or contemplated by the parties to the contract sued on. But where the prospective profits are the natural and direct consequences of the breach of the contract, they may be recovered; and he who breaks the contract cannot wholly escape on account of the difficulty which his own wrong has produced of devising a perfect measure of damages. (Citing authorities.) In Sutherland on Damages, section 64, the author, after speaking of profits which are too remote, says—quoting from a decided case: 'But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement.' (Citing authorities.) The prospective profits from the sale of hogs, calves and manure would have been one of the direct

> results of respondent's conduct of the butcher business if he had not been interfered with by appellant. Clearly, the inquiry was competent, relevant, and material as to prospective profits."

See also

Gurenini Stone Co. v. Carlin, 240 U. S. 264.

On page 280, the court says:

> "There was testimony as to the profits that plaintiff would have gained if the contract had been proceeded with in the ordinary manner, but this question was excluded from the consideration of the jury upon the ground that the profits were contingent and speculative. In this there was error."

These authorities seem to be a complete answer to appellant's contention that loss of actual profits, loss of credit and goodwill on a business are not proper items of damage.

Instruction No. 5, complained of by appellant, was given by the court with reference to certain special damages which appellee claimed it was entitled to by reason of the ousting of the receiver wrongfully appointed. The testimony in this regard was that appellee paid $1000.00 to its attorney for the setting aside of the appointment of Mr. Col as receiver and that there were other incidental expenses approximating $200.00 in connection with the dispossessing of Mr. Col. (Transcript p. 84.)

(a) Attorneys' Fees as an Item of Damage.

That attorneys' fees may be recovered in procuring the discharge of a receiver, see

Cook v. Terry, 19 Cal. App. 765.

At page 768, the court says:

"Plaintiff sought to recover damages for interruption to his business and also on account of fees paid to an attorney for procuring a dissolution of the order appointing the receiver. The evidence showed that although he had given a note for the attorney's fees, he had not, up to the time of the trial, paid anything thereon. Attorney's fees cannot be recovered in such an action as this unless they be actually paid. Upon retrial it is possible that this defect in proof of damages may be met, for 'Damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof, or certain to result in the future.' (Civil Code sec. 3283.)"

Josline v. Williams, 76 Neb. 594 (107 N. W. 837).

This case was an action of damages for the wrongful procurement of the appointment of a receiver.

At page 838, N. W. Reporter, the court says:

"There is no statute expressly authorizing the allowance of attorneys' fees as an item of damages where it is finally determined that a receiver should not have been appointed. That is true, however, of every other element of damages. The statute does not undertake to define the damages which the applicant for the appointing of a receiver may be called upon to pay in the event that the receiver is improperly appointed. That is equally true in cases of the allowance of a temporary injunction and the attachment of property under the provisions of the Code. It is now, however, the settled rule in this State that attorneys' fees are properly allowable in such cases as an element of damages and there seems to be no good reason why they should not be allowed in the case of the wrongful appointment of a receiver."

Appellant cites

Java Cocoanut Oil Co. v. Fidelity and Deposit, 300 Fed. 302,

as its authority against the allowance of attorneys' fees as an item of damage.

An examination of this case will show that the court held that fees paid for the entire defense of the action could not be recovered as damages upon a receiver's bond for the wrongful appointment of the receiver. It is quite universally held, e. g. in attachment cases and injunction cases where it is necessary to defeat the entire action in order to discharge an attachment or injunction, that the attorneys' fees paid for the defense of the entire action cannot be recovered as an element of damages on the attachment bond or injunction bond. However, it is just as universally true that the fees paid particularly for the discharge of the attachment and the discharge of the injunction may be recovered as an element of damages. This is the distinction made by the authorities.

In the case at bar, the evidence is that $1000.00 was paid to appellee's attorney for the ousting of A. G. Col and expended some $200.00 as expenses incidental thereto.

(b) Interest as an Element of Damages.

That interest may be properly allowed as damages in excess of the penalty of the bond, is well settled by the authorities. It is allowed not *eo nomine* as such, but as an item of damage on account of defendant's failure to perform its obligation. This distinction in this regard is aptly stated and discussed in

Brainard v. Jones, 18 N. Y. 35,
wherein the defendants were sued as sureties on a replevin bond, and interest was allowed on the amount of damage recovered.

At page 36 the court says:

> "The rule has often been laid down in general terms that sureties are not liable beyond the penalty of the bond in which their obligation is contained. But on a careful examination of the reason and justice of the rule, it will be found inapplicable to a question of interest accruing after they are in default, for not paying according to the condition of the bond. There is a plain distinction which has sometimes been lost sight of, and consequently some confusion and contradiction will be found in the cases on this subject. Whether a surety, at the time of his default, can be held beyond the penalty of his bond, is a question on the interpretation and effect of his contract. Whether interest can be computed after his default, where the effect will be thus to increase his liability, is a question of compensation for the breach of his contract."
>
> "In this case the defendants' bond was conditioned that Ramsdell should pay whatever sum might be recovered against him in a certain action of replevin. If the sum recovered against Ramsdell had been greater than the penalty of the bond, such penalty would, nevertheless, have been the measure of their liability at that time. But on the recovery of the judgment, their obligation was mature. Its utmost extent *then* was the penalty under which they had bound themselves for the payment by Ramsdell. But after that, they were in default, and during the continuance of that default, interest is due from them as in any other case where money is not paid when the creditor becomes entitled to it. It may be a reasonable doctrine, that a surety who has bound himself under a fixed penalty for

> the payment of money or some other act to be done by a third person, has marked the utmost limit of his own liability. But when the time has come for him to discharge that liability, and he neglects or refuses to do so, it is equally reasonable, and altogether just, that he should compensate the creditor for the delay which he has interposed. The legal measure of this compensation is interest on the sum which he ought to have paid from the time when the payment was due from him."

In other words, in the present case, defendant's obligation arose the moment the receiver was wrongfully appointed, and the damage was done. It was defendant's duty to pay it at that time. If it had so paid the penalty of the bond would have been the limit of its liability. It did not pay however, and now seeks to take advantage of its own wrongful refusal to pay by contending that it is not liable for the payment of interest. Continuing further the quotation from the opinion of the court in the above cited case, on page 37,

> "Returning to the distinction already mentioned, interest may be due, first, by contract express or implied from a course of dealing and the relations of parties; second, the law may exact it from a party who is in the wrong, by withholding money or value due from him to another. In the latter case, it is allowed as the just measure of damage for the violation of duty or contract; and sureties can claim no exemption from the rule. So far as interest is provided for in the contract, a limit to their liability may be found in the penalty which is a part of the same contract. But when the sum claimed becomes a debt actually due from them, and they continue in default, the question, properly considered, is one of damages for the delay. As the law in impos-

ing these damages finds its warrant, not in the terms of the contract, but in the rules of reason and justice, so it must follow that the same rules furnish the only restraint upon its powers in such cases. *The question, in short, is, not what is the measure of a surety's liability under a penal bond, but what does the law exact of him for an unjust delay in payment after his liability is ascertained and the debt is actually due from him.*"

In the present case the law is authorized to exact, and equity requires the exactment of interest from the defendant on account of its unjust delay in payment or performance of its obligation under the bond. It is a well settled principle of law that interest may be allowed as an item of damages, even though the interest makes the liability in excess of the penalty of the law, and is recognized by the following authorities:

Tacoma v. Sperry, etc. Co. (Washington 1914), 144 Pac. 544.

At page 545 the court says:

"The appellants contend that the judgment is for a larger amount than the bond. It is for the amount of the bond with interest from the date the action was brought. This is clearly within the rule that recovery may be had for the face of the bond with interest from the date the action is brought."

The last stated case was an action for damages upon an injunction bond, where the injunction had been wrongfully issued.

Furber v. McCarthy, 12 N. Y. Supp. 794.

This was an action against sureties upon an undertaking, the condition of which was to pay all costs

and damages which may be awarded to the defendant by reason of his arrest and imprisonment. At page 795 the court says:

> "When the judgment was entered, thereafter the liability of the sureties was established, and the interest became a legitimate item of damage."

Thus, when the judgment was entered exonerating the defendant from his arrest and imprisonment, so in the present case when it was adjudged that the receiver was wrongfully appointed, defendant's obligation to pay was thereby adjudicated, and its failure to pay became an item of damage that can be compensated for only by an award to plaintiff of a sum equal to the interest at the legal rate from the date the damage occurred.

United States v. North Carolina, 136 U. S. 211.

On page 216 the court says:

> "Interest, when not stipulated for by contract or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or compensation to which the plaintiff is entitled."

Holden v. Trust Co., 100 U. S. 72.

On page 74 the court says:

> "Here the agreement of the parties extends no farther than to the time fixed for the payment of principal. As to everything beyond that, it is silent. If payment be not made when the money becomes due, there is a breach of the contract and the creditor is entitled to damages. Where none has been agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none."

Young v. Godbe, 15 Wallace, 562.

At page 565 the court says:

"It is said there is no law in the Territory of Utah prescribing the rate of interest in transactions like the one in controversy in this suit, and that therefore no interest can be recovered, but this result does not follow. If there is no law on the subject interest will be allowed by way of damages for unreasonable withholding payment of an account. We must be reasonable and conform to the custom which obtains in the community in dealings of this character."

Panter v. National Surety Co., 36 Cal. App. 44.

At page 47 the court says:

"It is contended that the judgment is erroneous in so far as it provides for interest on the allowances for counsel fees and expenses incidental and necessary to the plaintiff's successful endeavor to secure the dissolution of the writ of injunction. The sufficiency of the evidence to support the trial court's finding of plaintiff's expenditures in this behalf is not assailed, nor is it contended that the several items of expense referred to were not properly assessed as damages, nor that the amounts so found to have been expended by the plaintiff were uncertain or incapable of being made certain by calculation. It is the rule that 'every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt.'"

Therefore, in view of the foregoing authorities, the jury considered only the elements of damages properly allowed by law and in this regard was properly instructed.

VI.

NO DEFAULT BY RECEIVER. APPELLANT'S POINTS IV, VI AND VII.

Appellant has, at all stages of this proceeding, attempted to try the case and the issues of the case as if it were based upon the failure of the receiver to properly perform his duties as such and to account faithfully to the court. This, of course, is not the proper theory of the case; not the theory of the pleadings of the case; not the theory upon which the case was tried, nor the theory upon which the jury was instructed.

A contention similar to that made by appellant in this case was made in the case of

Joslin v. Williams, supra.

The court at page 837 of N. W. Reporter states this contention as follows:

> "The principal questions presented for determination in this court may be summarized, first, as to the effect of the order approving the report of the receiver and directing the disbursement of funds upon the plaintiff's claim for damages by reason of the wrongful appointment; and, second, as to the measure of damages. It is urged on behalf of the defendants that the order confirming the report of the receiver and directing the

disbursement of funds in his hands amounts to an adjudication of the rights of the plaintiff. This contention cannot be sustained, except upon the theory that the plaintiff was compelled to litigate in that action her right to the damages involved in this action, and it would seem that a bare statement of the proposition ought to be sufficient to dispose of that question. The accounts of the receiver are not involved, nor was there involved in the accounts of the receiver any question of damages which might arise by reason of his wrongful appointment. The appointment of a receiver adjusts and determines the right of no party to the proceedings, and grants no final relief, directly or indirectly. Vila et al. v. Grand Island Electric Light, Ice & Cold Storage Co. et al. (Neb.) 97 N. W. 613, 63 L. R. A. 791. The discharge of the receiver and the settlement of his accounts was a necessary result of the appointment, and was, of course, conclusive as between the parties litigant and the receiver himself, but did not have the effect of determining the question of damages as between the litigants, any more than the dissolution of an injunction or the discharge of an attachment would determine the question of damages in actions where relief by injunction or attachment is sought."

Appellee in the case at bar is not seeking to recover damages or property which resulted as a defalcation of the receiver, but as stated before, for the wrongful appointment of the receiver in the first instance. Consequently, it is not necessary to establish a default of the receiver nor was it material for defendants to show that A. G. Col as such receiver had accounted to the court and had his account approved by the court. Nor was it necessary that plaintiff take any other action on the bond in suit than to file this

action. Appellee's only remedy was to sue on the bond in this action.

Dated, San Francisco,
December 2, 1929.

Respectfully submitted,
SIMEON E. SHEFFEY,
ALDEN AMES,
Attorneys for Appellee.